Supreme Court of the United States.

DECEMBER TERM, 1866.

THE MILWAUKEE AND ST. PAUL RAILROAD COMPANY, *Appellants*,
vs.
JAMES T. SOUTTER, *Survivor &c., Trustee.* } No. 182.

THE MILWAUKEE AND ST. PAUL RAILROAD COMPANY, *Appellants*,
vs.
JAMES T. SOUTTER, *Survivor &c.* } No. 212.

BRIEF FOR APPELLEES.

I.—STATEMENT OF THE CASE.

1. These two cases are each an appeal by the Milwaukee and St. Paul Railroad Company, from decrees of the Circuit Court of the United States for the District of Wisconsin, passed by said court in the suit of James T. Soutter, surviving trustee, against the La Crosse and Milwaukee Railroad Company, for the foreclosure of the mortgage given to Greene C. Bronson and James T. Soutter, on the Eastern Division of the La Crosse and Milwaukee Railroad.

2. The several mortgages having relation to the present appeals are as follows:

(*a*) The first mortgage, dated June 30, 1854, to Palmer, called the first, or Palmer mortgage, mortgages the Eastern Division from Milwaukee to Portage City, containing the following clause:

"Together with all locomotives, engines, and tenders, passenger cars and freight cars, shop tools and machinery, now owned, or hereafter to be acquired by said company, and in any way belonging or appertaining to said railroad now constructed or to be constructed within the limits aforesaid, including all its property, real and personal, pertaining to said railroad within said limits, and all its rights, credits, and franchises thereunto appertaining. * * * * It being distinctly understood that the conveyance made by this indenture is only for so much of the present, or hereafter to be acquired rights, interests, and *property* of the said company, * * as are or shall be vested or belong or appertain to that part of said railroad extending from Milwaukee to Portage City aforesaid." * * —(Transcript, No. 182, p. 181.)

(*b*) The next mortgage, which is on the Western Division, sometimes called the land grant mortgage, dated December 31, 1856, to Bronson, Soutter, and Knapp, contains the following clause:

"And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description which have already been or may hereafter be procured for or used on said roads, (meaning the road from Madison to St. Croix river or lake, and the road from Portage City to La Crosse,) or either of them, and all the materials, implements, utensils, and other personal property, which have been or may hereafter be procured for or used in connection with said roads, or either of them."—(Transcript, No. 182, p. 199.)

The St. Paul Company was organized on a foreclosure and sale of this Western Division mortgage.

The suit for the foreclosure of this mortgage is still pending on an appeal to this court from the decree of the District Court of Wisconsin, confirming the sale, argued at the present term, on Transcript, No. 169, and not yet determined.

(*c*) The next mortgage is on the Eastern Division, and is often spoken of as the second mortgage. It is dated August 17, 1857, and is made to Bronson and Soutter. It contains the following clause:

"And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description which have already been or may hereafter be procured for, or used on said railroads or either of them, and all the materials, tools, implements, and utensils, and other personal property, which have been or may hereafter be procured for or used in connection with said railroads, or either of them: * * * and it is hereby declared to be the intention of the parties to convey to and vest in said parties of the second part, all the property, real and personal, of said railroad company, to be acquired hereafter, as well as that which has already been acquired, together with all the rights, privileges, liberties, and franchises of said railroad company, in respect to said railroad from Milwaukee to Portage City, * * as fully and amply as the same might be conveyed if said railroad had already been fully constructed and equipped."—(Transcript, No. 182, p. 206.)

Suit for the foreclosure of this mortgage is still pending, the present transcripts, Nos. 182 and 212, being offshoots of the cause.

(*d*) The next mortgage is of the whole road,—the road of the La Crosse Company,—being the mortgage to Barnes, dated June 1, 1858. This mortgage conveyed the whole road from Milwaukee to La Crosse, and all the rolling stock, personal property, choses in action, and property of the debtor company, real, personal, and mixed.—(Transcript, No. 182, p. 213.)

The Minnesota Company holds by purchase under the foreclosure of this mortgage, with appeal thereon pending.—(Transcript of this term, No. 202.)

3. For explanation of the general relation of these cases to one another, and to the other cases growing out of suits on mortgages granted by the La Crosse Railroad, reference is made to the introductory matter in the brief

filed in No. 203, by the undersigned, counsel of the Minnesota Company.

II.—Appeal No. 212.

1. The appeal in No. 212, allowed November 16, 1865, is in the following words:—(Transcript No. 212, p. 46.)

"James T. Soutter, survivor, &c., vs. The La Crosse & Milwaukee Railroad Company, and others.	Circuit Court of the United States for Ninth Circuit and Dist. of Wisconsin.

"To the Honorable the Judges of said Circuit Court:

"Your petitioner, the Milwaukee and St. Paul Railroad Company, by John W. Cary, its solicitor, humbly complaining, respectfully represents that it is injured and aggrieved by the order of the Circuit Court in this cause made on the 18th day of July, A. D. 1865, in so far as it orders and directs your petitioner, the said Milwaukee and St. Paul Railway Company, its officers, directors, agents, and employees, to deliver to the defendant, Milwaukee and Minnesota Railroad Company, all the rolling stock that was on the whole La Crosse and Milwaukee Railroad, or belonged or appertained thereto, when the receiver was appointed, except forty box cars therein specified, on certain conditions in said order named.

"Wherefore your petitioner prays an appeal to the Supreme Court of the United States from so much of said order as relates or refers to your petitioner, the Milwaukee and St. Paul Railway Company, or in any manner relates to or effects the title or possession of your petitioner to the rolling stock which was on the whole of the La Crosse and Milwaukee Railroad, or belonged or appertained thereto when Hans Crocker was appointed receiver thereof.

"Your petitioner herewith offers Your Honors a bond according to law, to be approved by you, and prays the allowance of an appeal and a citation according to law, and your petitioner as in duty bound will ever pray, &c.

"Milwaukee and St. Paul Company, by—

"John W. Cary, *Solicitor*."

2. The decree appealed from is found in Transcript No. 182, pp. 550, 553, as follows:

"Ordered, further, that in case said Milwaukee and Minnesota Railroad Company shall, before the sale of the mortgaged premises in this cause, pay to the clerk of this court, for the complainant in this cause, the several sums above mentioned, with interest thereon as aforesaid to the day of such payment, and the costs in this cause to be taxed; that upon such payment the receiver, Hans Crocker, and the said Milwaukee and St. Paul Railway Company, its officers, directors, agents, and employees, deliver over to said Milwaukee and Minnesota Railroad Company the eastern division, so called, of the La Crosse and Milwaukee Railroad, so called, from Milwaukee to Portage, together with all the rolling stock that was on the whole of the LaCrosse and Milwaukee Railroad, or belonged or appertained thereto when the said receiver was appointed, except forty box cars, numbered as follows, &c., and also deliver to said Milwaukee and Minnesota Railroad Company such proportion of the rolling stock that was purchased by the receiver as $121,178 bears to $26,199, together with all the rights, privileges, and franchises, and personal and other property belonging or in any way appertaining to said railroad from Milwaukee to Portage, and that the said receiver be thereafter dismissed and discharged, except for the purpose of passing his accounts."

3. This decree was passed in apparent obedience to the mandate of the Supreme Court, found in Transcript, No. 182, pp. 15, 18.

4. The grounds on which the St. Paul Company rest their appeal are stated in their motion of September 25, 1865, for an order modifying the said order of July 18, 1865, in so far as it relates to rolling stock, for the following assigned reasons:—(Transcript, No. 212, p. 21.)

"1. So that said order may conform to the mandate of the Supreme Court in said cause.

"2. Because the Milwaukee and St. Paul Railway Company was not a party to this suit at the time of granting said order, and not subject or amenable to the orders of this court in this cause, and the same as to said company is without jurisdiction and void.

"3. That said rolling stock was not within the juris-

diction and control of this court in this cause, or subject to its order.

"4. Because said supplemental mortgage mentioned in the annexed petition covered and included the property, and its lien is prior and superior to the claim or right of said defendant, Milwaukee and Minnesota Railroad Company.

"5. Because said Milwaukee and St. Paul Railway Company is entitled to be treated as a mortgagee, in possession under said supplemental mortgage, on the facts stated in its petition.

"6. Because for the purposes of this proceeding the title of the Milwaukee and St. Paul Railway Company, under the order of June 12, 1863, in the foreclosure suit of Bronson, Soutter, and Knapp, mentioned in said petition, cannot be questioned.

"7. Because said rolling stock was covered by, and included in, the Bronson, Soutter, and Knapp mortgage of December 31, 1865, the decree of the 13th of January, 1862, and the marshal's sale and transfer to the Milwaukee and St. Paul Railway Company.

"8. Because said order is contrary to equity and good conscience."

These reasons are set forth more at large in the petition of the La Crosse and Milwaukee Railroad, of the same date.—(Transcript, No. 212, p. 22.)

5. Finally, by decree of September 28, 1865, passed in the main cause—that is, the suit of foreclosure of the Eastern Division—the Circuit Court ordered the same to be sold for the satisfaction of the mortgage.—(Transcript, No. 212, pp. 36, 38.)

In which order the two following paragraphs appear, viz:

"The description of the property authorized to be sold under and by virtue of said order is as follows, viz:

"All and singular the railroad of said company, commencing at the city of Milwaukee and running thence to Portage City.

* * * * * * *

"And also all and singular the locomotive engines, cars, and rolling stock, and all the materials, tools, im-

plements, and utensils, and other personal property which had been procured for, or used in connection with, said roads, or either of them, prior to the appointment of Hans Crocker as receiver of said road, except forty box cars, numbered respectively, &c., and including as part of said mortgaged premises such proportion of the rolling stock bought by the receiver since his appointment as the net earnings of the Eastern Division of said railroad bear to the earnings of the Western Division, as ascertained by the report of H. L. Palmer, and as confirmed by this court.

"It is further ordered and decreed that this decree shall not prejudice the rights of the Milwaukee and Minnesota Railroad Company, under the order of the court in this cause made on the 18th day of July, A. D. 1865, providing for the entry of said company into possession of said mortgaged premises, on certain terms and conditions fixed by said order, and the said Milwaukee and Minnesota Railroad Company shall be at liberty to avail itself of the provisions of the said order, notwithstanding this decree, at any time before the sale of said mortgaged premises in this cause."

III.—Appeal No. 182.

1. The appeal of the Milwaukee and St. Paul Railroad Company is this case is found in Transcript, No. 182, p. 504, and reads as follows:

"James T. Soutter, Survivor, &c., Trustee, vs. The La Crosse and Milwaukee Railroad Company and others.	Circuit Court of the United States for the Ninth Circuit and District of Wisconsin.

"To the Honorable Samuel F. Miller, Justice of the Supreme Court, and Honorable Andrew G. Miller, District Judge of said Court:

"Your petitioner, the Milwaukee and St. Paul Railway Company, by John W. Cary, their Solicitor, respectfully shows to your honors that it is injured and aggrieved by the report of Henry L. Palmer, Esq., auditor in this cause, in charging your petitioner in the said re-

port, and report to the special exception of the Milwaukee and Minnesota Railroad Company as follows, to wit:

"To use of railway stock belonging to Eastern Division from June 13, 1863, to February 28th, 1865,.....$123,374 40

Use of same railway stock from September 1, 1864, to February 28, 1865..... 86,466 54

Amounting to the sum of.....$209,840 94

"And by the order and decree of this court overruling your petitioner's exceptions thereto; and by the order and decree of this court sustaining the eighth exception of the Milwaukee and Minnesota Railroad Company to said auditor's report; and by the order and decree of the court this day entered on said report and exceptions; and your petitioner therefore prays an appeal therefrom to the Supreme Court of the United States.

"JOHN W. CARY,
Solicitor for the Mil. and St. P. Ry. Co."

2. In order to understand the matter of this appeal we have to refer to the exceptions of the appellants and the order of the court thereon; to the exceptions of the Milwaukee and Minnesota Railroad Company and the order of the court thereon; and to the final order of the Circuit Court on the several exceptions.

(*a*) The exceptions of the Milwaukee and St. Paul Company are found in Transcript, No. 82, p. 505, and are as follows:

"James T. Soutter, &c.,
vs.
The La Crosse and Milwaukee Railroad Company and others.
} Circuit Court of the United States for the District of Wisconsin.

"The exceptions of the Milwaukee and St. Paul Railway Company to the report of Henry L. Palmer, Auditor, filed in this case on the 28th day of June, 1865:

"*First.* The Milwaukee and St. Paul Railway Company excepts to so much of said report as disallows its claim for the use of rolling stock, as charged and contained in Exhibits E, and E continued, attached to said report, as follows, to wit:

"1st. Item No. 39, of Exhibit E, for the sum of $166,-192.30; 2d. Item No. —, of Exhibit E continued, for the sum of $36,118.86; 3d. So much of Item No. 38, of Exhibit E, as was disallowed by said auditor, amounting to the sum of $17,179.69; all of which said amounts should have been allowed and credited as contained in said Exhibit E, and E contined.

"*Second.* The Milwaukee and St. Paul Railway Company excepts to so much of said report as finds that only forty box cars, and such proportion of the rolling stock as was purchased and put on the road by the receiver, as the net earnings of the Western Division, from the 11th of June, 1860, to the 13th day of January, 1862, bear to the net earnings of the Eastern Division for the same period of time, is owned by the Milwaukee and St. Paul Railway Company, and that all the remaining stock on the road on the 13th day of June, 1863, belonged to, and was owned by the owners of the Eastern Division of said road.

"*Third.* The Milwaukee and St. Paul Railway Company excepts to so much of said report as charges it for the use of the share of the rolling stock belonging to the Eastern Division on the Western Division, and on its other roads, from the 13th day of June, 1863, to the 28th day of February, 1865, the sum of $123,374.40, whereas the auditor should have found and reported that no part of said rolling stock which was on said road on the 11th day of June, 1860, which the receiver took possession, was in the possession or under the control of said receiver of the Milwaukee and St Paul Railway Company, as receiver, or in the custody or control of the court after the 12th day of June, 1863, but that the same was in possession and control of the Milwaukee and St. Paul Railway Company, as owner.

"*Fourth.* The Milwaukee and St. Paul Railway Company excepts to so much of said report as finds that the tools and supplies belonging to the entire road belonged to the owners of the respective divisions of the road in proportion to the amount of the rolling stock owned by each.

"*Fifth.* The Milwaukee and St. Paul Railway Company excepts to such report, as it finds that said Milwaukee and St. Paul Railway Company should be charged with the sum of $34,757.50 for wood received at the same

time, whereas such supplies and wood are necessarily appurtenant to the road, and said report should have provided that the wood and supplies now on hand on said division should be received in lieu of those received by said Milwaukee and St. Paul Railway Company on said 13th day of June, 1863, or at least they should be so received, to the extent of the value of the supplies of wood now on hand on said division."

"JOHN W. CARY,
Solicitor for M. St. P. R. Co."

(*b*) The eighth exception of the Milwaukee and Minnesota Company to the auditor's report, is found in Transcript, No. 152, p. 501, and is as follows:

"The item No. 28, contained on the credit side of the account, 'Exhibit E,' new buildings, $27,497.84, is also specially excepted to by the Milwaukee and Minnesota R. R. Co., in and by Exhibit K K K. I have ascertained and report that the sum was expended for the erection of new buildings on the machine-shop grounds in Milwaukee, extension of depot buildings, erection of water-houses, and other improvements on the Eastern Division; that all these erections were not necessary for the Eastern Division, operated as a road, commencing at Milwaukee and terminating at Portage City, and not forming a part of a through line to the Mississippi river; that these improvements were projected, and commenced, and the expenditures mainly made, while the two divisions of the road were operated together as one through line, and before the opening of another route from Portage City to Milwaukee was contemplated, and that as the said railroad from Milwaukee and Portage City was then circumstanced, those buildings and improvements were necessary to its proper and profitable operation, and the expenditure was properly and prudently made. I therefore audit and allow this credit, amounting to said sum of $27,497.84 to the Milwaukee and St. Paul Company, and disallow the said exception thereto. Whereas the said auditor ought to have disallowed said item of $27,-497.84, for the reason that the same was not directed by any order of the court, and was an unnecessary and improvident expenditure upon the mortgaged premises in this cause. See testimony of E. H. Goodrich, printed

pages (filed herewith) 106 and 107, manuscript testimony of E. H. Goodrich, returned by the anditor."

(c) The order on exceptions is found in Transcript, No. 152, p. 550, and is as follows:

"And afterwards to wit, on the 18th day of July, A. D. 1865, this cause came on to be heard upon the exceptions filed on behalf of the Milwaukee and St. Paul Railway Company, to the report of H. L. Palmer, auditor, made on the references to him by order of the 28th April, 1864, and October 8th, 1864, concerning the accounts of the receiver and the Milwaukee and St. Paul Railway Company, and also on the exceptions of the Milwaukee and Minnesota Railroad Company, and Hans Croker, receiver, to said report. And the court having heard the argument of John W. Cary, counsel for the Milwaukee and St. Paul Railway Company, and M. H. Carpenter, counsel for the Milwaukee and Minnesota Railroad Company, and James S. Brown, counsel for Hans Croker, receiver, it is ordered that the first, second, and third exceptions of the Milwaukee and St. Paul Railway Company be overruled, and that the fourth and fifth exceptions of said company be sustained; and as to the said fourth and fifth exceptions the court finds that the auditor's report be so modified as to charge the said company with only the proportion of the supplies on hand, except wood, which the Eastern Division bears to the Western Division in length of road, namely, 95 to 105 miles. And the exceptions of said company to the supplemental report of said auditor, filed 14th July, 1865, are also overruled. The exceptions of Hans Croker to said auditor's report, are overruled. And as to the exceptions of the Milwaukee and Minnesota Railroad Company to said auditor's report in chief, the first, second, third, fourth, fifth, sixth, seventh, ninth, and tenth, (1, 2, 3, 4, 5, 6, 7, 9, and 10,) of said exceptions, are overruled; that the sixth exception of the Milwaukee and Minnesota Railroad Company be overruled without prejudice to the right of that company to proceed against the said Hans Croker, receiver, for contempt of court for misfeasance or malfeasance, as receiver and; without prejudice to any proceeding against said receiver for damages for misfeasance or malfeasance, as receiver, and the eighth (8) of said exceptions is sustained. The eleventh of said ex-

ceptions having been amended by filing a twelfth exception, which was referred to said auditor, and on which he made a supplementary report, are overruled, and the same confirmed as to the charge of $86,466.54.

"It further appearing that the said Milwaukee and St. Paul Railway Company had, since the 28th day of February, 1865, paid to the receiver the sum of $48,000 on account of the matters so audited up to that date, said sum is hereby allowed as a credit on the sum found by the auditor to be in their hands, payable to the receiver. And the court, correcting the auditor's report in the particulars above mentioned, finds that there is now in the hands of the Milwaukee and St. Paul Railway Company, as money due and payable to Hans Croker, as receiver of the Eastern Division of the La Crosse and Milwaukee Railroad, the sum of ($364,188.58) three hundred and sixty-four thousand one hundred and eighty-eight dollars and fifty-eight cents.

"And it appearing to the court that the cash balance due to said receiver is the sum of $12,681.69, and that there is due to the complainant for the expenses of this suit the sum of $35,796.34, together the sum of $48,478.03. Now, upon consideration, this court doth order that the Milwaukee and St. Paul Railway Company, on or before the 1st day of September, 1865, do pay in cash to said receiver the sum of $12,681.69, and in cash to said receiver for said James T. Soutter, trustee, by the same day, the sum of $48,478.03, the same to be credited upon said indebtedness of $364,188.58.

"And it is further ordered that the said Milwaukee and St. Paul Railway Company, on or before the fifth day of September, 1865, pay to Hans Croker, receiver, the further sum of three hundred and fifteen thousand seven hundred and ten dollars and fifty-three cents; and that in making said last payment, if made by the 1st of September, 1865, said Milwaukee and St. Paul Railway Company may pay to the receiver in past-due coupons for interest on the bonds secured by the mortgage in this cause in such amount as the holders of such coupons would be entitled to on their said coupons if the whole amount thereof was paid in cash."

3. With this preliminary statement of the several appeals, and the matters on which they are respectively

founded, we are now prepared for the questions of law or fact which the court is here called upon to review.

II.—Questions for Discussion.

1. The first question in order, as well as importance, in the action of the Circuit Court, is that of the proprietorship of the rolling stock, as determined by the decree appealed from in No. 212.

As to this we have to observe:

(*a*) First. That decree in this respect was rendered in obedience to the mandate of the Supreme Court, and if appeal lies from such a decree nothing is before this court but the proceedings subsequent to the mandate; and whatever had been formerly before the court, and disposed of by the decree, is considered as finally disposed of and settled.

Himely vs. Rose, 3 Cranch, 316.
Browden vs. McArthur, 7 Wheaton, 58.
The Santa Maria, 10 Wheaton, 431.
Sibbald vs. United States, 12 Peters, 488.
Mitchell vs. United States, 15 Peters, 52.
Corning vs. Troy Iron Factory, 15 Howard, 450.
Carter vs. Penn. Ins. Co., 1 Peters, 512.

(*b*) Secondly. The matter of the mandate is *res judicata*, it having been decided in the case of Minnesota Company vs. St. Paul Company, 2 Wallace, 607.

(*c*) Thirdly. The Supreme Court has no power to review and reverse its own decisions in equity.

Martin vs. Hunter's Lessee, 1 Wheaton, 364.
Browden vs. McArthur, 7 Wheaton, 58.
Sibbald vs. United States, 12 Peters, 492.
Washington Bridge Co. vs. Stewart, 3 How., 413.
Hopkins vs. Lee, 6 Wheaton, 109.
Bank of the United States vs. Moss, 6 Howard, 31.

(*d*) Fourthly. If, despite of these considerations, there be competency or occasion to rediscuss the decision in

this case, then we refer to the brief in behalf of the Minnesota Company, in No. 203 of the present term.

2. We may take as the next subject of discussion the grounds or reasons of appeal in No. 212, set forth by the St. Paul Company in their motion of September 25, 1865, for an order to modify the order of July 18, 1865, as to the title and property of the rolling stock.—(See Transcript 212, p. 21.)

(*a*) First. The St. Paul Company pretend that said order of July 18, 1865, does not conform to the mandate of the Supreme Court in the cause.

We aver the contrary of this, and defer the point for oral discussion.

(*b*) Second. The St. Paul Company pretend not to have been a party to the suit at the time of granting said order of July 18, 1865, and that, therefore, as to it, the order is without jurisdiction and void.

We answer, that on the 3d day of July, 1865, the St. Paul Company appeared in the cause as a party, and filed exceptions to the report of the auditor.—(Transcript, No. 182, p. 505.)

We answer further, that the said St. Paul Company appeared as a party, and participated in all the proceedings before the auditor, producing and cross-examining witnesses.—(Transcript, No. 182, pp. 45, 83, 103, 119, 123, 147, 160, 169.)

Finally, it appears by the transcripts of the record of proceedings anterior to the contents of No. 182, that the St. Paul Company did become a party to the foreclosure suit on the Eastern Division by voluntary petition—(Transcript, December Term, 1864, 2 Wallace, 609), prior to June 12, 1863; and by the record in Transcript, No. 182 of the present term, the St. Paul Company appears as a petitioner in the Eastern Division suit on the 6th of May, 1863.—(Transcript 182, p. 259.)

In consequence of this the St. Paul Company was subject to all orders of the court, and appeared in the cause

from time to time as its interests required; as, for example, in the transcript of 2 Wallace 510, p. 18, as well as in the instances cited from the present transcript.

(*c*) Third. The St. Paul Company pretends that the said rolling stock was not within the jurisdiction or control of the court in this cause.

We answer that said rolling stock was within the jurisdiction of the court by the express terms of the mandate of the Supreme Court.

We say further that the rolling stock was within the jurisdiction of the court in this cause, for the reason that it was comprehended in terms by the mortgage to foreclose which the suit was brought.

We say further, that although the order of sale which withheld this rolling stock from the St. Paul Company, according to said company only the forty box cars enumerated was passed in the twin suit to foreclose the land grant or Western Division mortgage, still the decree in the latter cause was a judicial fact of which the court, in this cause, could not fail to take notice as of record, the more so since the St. Paul Company had voluntarily come in to assert its rights in the present suit on the Eastern Division mortgage.

Indeed, this objection of the St. Paul Company is trivial if not frivolous. The Minnesota Company, as purchased under the Barnes mortgage, owned the right in equity of the Eastern Division, and whatever of rolling stock appertained thereto; while the St. Paul Company, as purchaser under the Soutter-Knapp mortgage, owned the Western Division with the forty box cars appertaining to that part of the road, but laid claim also to the rolling stock of the Eastern Division. No determination of the relative rights of either could be made without effecting the rights of the other. Hence each of them became incidentally an adverse party to the other, and more especially the St. Paul Company aiming to engross the whole road of the La Crosse Company, in order to

effect its objects, it was necessary for the St. Paul Company to become, as it did, a party by petition to the foreclosure suit on the Eastern Division.

(*b*) Fourth and Fifth. The St. Paul Company sets up claims of right under a certain supplemental mortgage, which, it is pretended, the La Crosse Railroad Company gave to Bronson, Soutter, and Knapp on the 4th of September, 1857, described in the petition of the St. Paul Company.—(Transcript, No. 212, p. 24.)

Suffice to say, that the mortgage was, on its face, as described in said petition, a chattel mortgage without essential conditions of legality; that, as the records show, it has not been put in suit; that the St. Paul Company has not acquired, and does not hold, any rights under it, and that the introduction of the mortgage into the petition of the St. Paul Company is the desperate expedient of dishonesty and injustice as respects the Minnesota Company.

(*c*) Sixth. The St. Paul Company pretends to hold under the decree of June 12, 1863, in the Western Division case, which, it says, cannot be questioned in this cause.

We reply that the contemporaneous decree of June 12, 1865, *in this cause*, has been rescinded by the court which passed it for admitted illegality, as having been passed in the wrong court.—(Transcript of this Term, No. 416, p. 393.)

We reply further that the *reason* for which the decree of June 12, 1863, in the Eastern Division cause, was rescinded, applies with equal force to the decree of the same date in the Western Division cause, namely: the judgment of the Supreme Court in Bronson vs. Railroad, 1 Wallace, 405.

(*f*) Seventh. The St. Paul Company pretends that the rolling stock in controversy was included in the mortgage, the decree of sale, and the sale of the Western Division.

We reply, that the language of the mortgage itself is to the contrary of this.—See the mortgage, (Transcript

No. 152, p. 161,) which clearly expresses mortgage of the Western Division alone, and of the rolling stock of said division.

We reply, that express language of the decree of sale, and of the sale itself, negatives the pretention.—(See the decree and report of sale, Transcript, No. 152, pp. 252, 256.)

We reply that the district judge who passed the decree has explained their meaning while exhibiting the reasons of his action in this respect.

We reply, that the Supreme Court, in adopting the same construction of the mortgage, and of the decree under it, has closed up the question against the St. Paul Company.

(*g*) Eighth. The St. Paul Company concludes its reasons with a general allegation, that the order appealed from is "contrary to equity and good conscience."

We deem it superfluous to say anything in response to this vague allegation until the particulars of unconscientiousness and inequitableness in the decree shall have been specifically pointed out: assuming presumption of equity and good conscience in favor of any judgment of the Supreme Court, and especially of any order of the Circuit Court of Wisconsin on these causes, which enjoyed the concurrent opinion and action of the two judges of that circuit court.

(*h*) In conclusion of this part of the argument it is to be noted, that the circuit court in ordering the sale of the Eastern Division, by its decree of September 8th, 1865, on the precise premises of the previous orders regarding the rolling stock, and the earnings thereof—that decree remaining in full force, and having been acted upon by the parties directly in interest—would seem to bind this court to stand by its decision in the case of the Minnesota Company against the St. Paul Company, which guided and governed all the orders of the circuit court.

(*i*) These considerations dispose of the appeal in No.

212, which lies at the foundation of the whole controversy, and leaves nothing which demands discussion, except the secondary questions involved in the appeal of No. 182, which we now proceed to take up *seriatim*.

3. All the questions presented on the record in No. 182 arise on exceptions of the St. Paul Company to the report of the auditor, H. L. Palmer.

Mr. Palmer was appointed auditor by an order of the court of April 28, 1864, this order is not to be found in the present transcript, but only in this transcript an additional order of October 8, 1864, by which additional matters are referred to him, with instructions "to examine and report thereon *in like manner* as upon the account and exceptions referred by said former order."—(Transcript, No. 182, p. 2.)

This circumstance illustrates the inseparability of all these cases, and the necessity to which the counsel and the court are subjected of referring from one transcript to another, in order to understand any one of the fragmentary causes of the *dissecta membra* of the La Crosse Railroad, as they successively come before this court.

In fact there were seven successive orders of reference to Mr. Palmer.

The first order of reference, that of April 28, 1864, appears in Transcript 415 of the present term, p 399, and is in the following words:

"This day ordered by the court that the receiver file in this court a continuous monthly account of his receipts and disbursements, as receiver, from the time of his appointment, including the receipts and disbursements of the Milwaukee and St. Paul Railway Company, from 12th of June, 1863, by the 1st day of June next, and that any person interested may examine the same and file exceptions thereto; and that H. L. Palmer, esquire, be, and is, appointed an auditor to report on the same to the next term of this court."

Next follows the order of October 8, 1864, which more in detail provides for an examination of the receipts and

disbursements of the receiver, and allowances him for services and expenses, and expressly requires that the auditor ascertain and report what should be charged for "the use of rolling stock formerly used for said railroad," as a part of the accounts reported by him.—(Transcript, No. 182, p. 2.)

Then comes an order of April 17, 1865, extending the period of Palmer's report to the next June.—(Transcript, No. 182, p. 38.)

Then comes an order of July 11, 1863, requiring the auditor to report whether any allowance has been made by him "for the use of rolling stock belonging to the Eastern Division used on the Western Division or other roads operated by the Milwaukee and St. Paul Railway Company," from September 1, 1864, to June 28, 1865, and if not, to report what sum should be allowed therefor.—(Transcript, No. 182, p. 511.)

Then, July 18, 1865, a further reference is made to the auditor to report "what sums should be charged and credited for use and repairs of rolling stock," in settlement of the receiver's account from February 28, 1865, to August 15, 1865; said report to be rendered the next September.—(Transcript, No. 182, p. 554.)

The last preceding order carries us beyond the appeal in No. 182; but by reference to Transcript 416 of the present term, p. 401, will be found two additional orders of April 13 and April 14, 1866, which carry forward the directions to the auditor to continue to report what sums should be charged and credited for use and repairs of rolling stock, upon the same basis as that adopted in previous reports.

Let us look now to the particular questions suggested by the exceptions of the St. Paul Company to the auditor's reply and its appeal thereon.

(*a*) First. The St. Paul company excepts to so much of said report as disallows its claim for the use of rolling stock, as charged in Exhibits E and E continued.—(Trans-